defendant not remarried, her late husband's share would have reverted to her instead of the sisters of the deceased. I have not lost sight of the fact that the Tusun Tunggu (Third Division) Order came into force after the decision in the *Indun (f) anak Ugu's* case and that when that case was decided, the Tusun Tunggu was not in operation in the then Third Division covering Sarikei. However, I find that this decision does not appear to be at variance with the passages which I have earlier quoted from the English translation of the Tusun Tunggu. It is true that in his evidence Penghulu Ghani anak Sat has stated that brothers and sisters of the whole blood of the deceased would be entitled to a share in the "barang bahru" of the deceased but he subsequently modified his evidence on the point and agreed with the decision in the *Indun (f) anak Ugu's* case relating to the distribution of the "barang bahru" of the deceased. Hence, in the light of the modification to his evidence, provided that after the death of the deceased here, his widow did not re-marry and continued to stay in the same bilek, which is the case here, then brothers and sisters of the whole blood of the deceased are not entitled to his share in the "barang bahru". Tuai Rumah Chawan anak Nyuak (DW9) called by the first respondent as an expert witness has testified *inter alia* that the estate of the deceased would have no share in the "barang bahru" as the deceased is dead but I find that his evidence on the point conflicts with the decision of the *Indun (f) anak Ugu's* case as well as the evidence of Penghulu Ghani anak Sat (PW2) as modified by him. Hence, I cannot accept his evidence on the point.

DW9 also said that a natural son and adopted children by a previous marriage of the deceased would have no share in the "barang bahru" of the deceased. This is not at variance with the evidence of PW2 save that the latter stated that any such children would have a share in the "barang bahru" only if they had worked all the time together with the deceased in the "barang bahru". DW9 also stated that if a daughter of the first marriage helped in working the "barang bahru" only once in a while whilst staying elsewhere, she would have no share in the "barang bahru". She would only have a share if she was working in the "barang bahru" with the deceased and was staying in the deceased's bilek as well. I find that his evidence does not conflict with the evidence of PW2 on this point. but I prefer and accept the evidence of PW2. Be that as it may, the evidence of DW9 would appear to support the conclusion that in the circumstances of this case, the fifth respondent does not qualify for a share in the "barang bahru" of the deceased. If any further authority is required for this view, reference may be made to the case of *Egah anak Igu* v. *Inggol anak Jegong*.[2] I find on the evidence, that the fourth and fifth respondents are not entitled to any share in the "barang bahru".

Learned counsel for the first respondent supported by learned counsel for the applicant has submitted that the third respondent does not qualify for a share in the "barang bahru" of the deceased in accordance with the relevant Iban customary law. I accept the evidence as modified of PW2 on the method of distribution of the "barang bahru" of the estate of the deceased in accordance with the Iban customary law in Sarikei and I have also found that the decision in the *Indun (f) anak Ugu's* case, *supra* does not appear to conflict with the relevant passages quoted above from the translation of the Tusun Tunggu applicable to Sarikei. I find that in the circumstances and on the applicable customary law, the third respondent does not qualify for a share in the "barang bahru" of the deceased and that such "barang bahru" should be distributed as follows: one-half share (including the deceased's share) to the first respondent, and the other half share to be shared equally between Sandom anak Achong (DW2) and Jalang anak Achong and I so order.

In the result, I order that in respect of the "barang lama" of the deceased, namely, (a) that parcel of land known as Lot 271 Block 138 Sarikei Land District comprising 5.21 acres more or less; and (b) that parcel of land known as Lot 94 Block 153 Sarikei Land District comprising 3.27 acres more or less, shall be inherited by and vested in the fourth and fifth respondents in equal shares. One-half of the "barang bahru", namely, (a) that parcel of land known as Lot 205 Block 138 Sarikei Land District comprising 11.32 acres; (b) that parcel of land known as Lot 80 Block 137 Sarikei Land District comprising 1.45 acres; and (c) one SBBL shotgun (12-bore No. BTR-6-2958 "Champion") and household belongings shall be inherited by and vested in the first respondent. and the other half shall be inherited by and vested in Sandom and Jalang in equal shares. As to the actual distribution, I shall leave it to the Probate Officer, Sarikei and if there is any difficulty, no doubt the assistance of the relevant Penghulu may be enlisted.

As to costs, I order that each party shall bear his or her own costs. This has not been objected to by the parties. I consider that in the circumstances, particularly having regard to the value of the estate of the deceased, which is not considerable, that this is the fairest order to make.

Order accordingly.

PUBLIC PROSECUTOR v. MOHAMED KASSIM BIN YATIM

[A.Cr.J. (Hashim Yeop A. Sani J.) September 10, 1976]
[Ipoh — Criminal Appeal No. 98 of 1975]

Criminal Law and Procedure — Respondent charged under s. 12(1)(d) of the Passports Act, 1966 — Signatures on application for passport alleged to be respondent's — Evidence of handwriting expert — Whether conclusive — Whether prima facie case made out at close of prosecution — Passports Act, 1966, s. 12(1)(d).

Evidence — Evidence of handwriting expert — Whether conclusive.

In this case the Public Prosecutor appealed against the acquittal of the accused in respect of 3 charges under section 12(1)(d) of the Passports Act, 1966. That section provides that any person who with intent to obtain for himself or any other person a passport or other travel document knowingly makes any false statement which to his knowledge is false in any material particular shall be guilty of an offence punishable under that section. The charges were that the accused knowingly made false statements separately on the application forms of W., L. & M. respectively to the effect that he had known these applicants for a certain number of years and signed against those statements with the name "Mohd. Kassim bin Yatim, P.J.K." The court was told that it had been the

practice for the immigration officers to accept recommenders for applications for passports from amongst persons who are holders of P.J.Ks. The applicants testified that their application forms were filled up by a certain Chinese petition writer who typed out the particulars in the forms and who also told them he could find a suitable recommender for them. The forms were returned to the applicants and the recommendation made and appeared to have been signed by a person named "Mohd. Kassim bin Yatim, P.J.K." The applicants paid the petition writer a sum of money for the recommendation. They testified that they never saw much less knew who the said "Mohd. Kassim bin Yatim" was and therefore to that extent the statements in the applications were false. As the Chinese petition writer could not be traced by the prosecution, there was an absence of a direct link between those signatures and the accused. The prosecution adduced evidence of other witnesses who were familiar with the accused's handwriting and signature and also the evidence of the handwriting expert.

The learned President concluded that the handwriting expert was not absolutely certain that the signatures were made by one and the same person and on that ground alone acquitted and discharged the accused.

Held, dismissing the appeal: (1) evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive;

(2) in this case it could not be said that at the close of the prosecution evidence, the prosecution had established a *prima facie* case, which if unrebutted would warrant a conviction, and therefore the respondent was rightly acquitted and discharged.

Cases referred to:-

(1) *Ishwari Prasad* v. *Mohd. Isa* A.I.R. 1963 S.C. 1728.
(2) *Indar Datt* v. *Emperor* A.I.R. 1931 Lahore 408, 413.
(3) *In re B. Venkata Row* (1913) I.L.R. 36 Mad. 159; 14 I.C. 418; 13 cr. L.J. 226.
(4) *Srikant* v. *King Emperor* (1905) 2 A.L.J. 444; 2 Cr. L.J. 353.
(5) *Kali Charan Mukerji* v. *Emperor* (1909) 9 Cr. L.J. 498; 2 I.C. 154.
(6) *Abdul Rahman* v. *Public Prosecutor* [1940] M.L.J. 55.
(7) *Goh Khiok Phiong* v. *Regina* [1954] M.L.J. 223.
(8) *Davies* v. *Director of Public Prosecution* [1954] 1 All E.R. 507; [1954] 2 W.L.R. 343.
(9) *Guntaka* v. *Busetti* A.I.R. 1954 AP 39.

CRIMINAL APPEAL.

Mokhtar bin Abdullah (Federal Counsel) for the appellant.

P.S. Gill for the respondent.

Hashim Yeop A. Sani J. (delivering oral judgment): This is an appeal by the Public Prosecutor against the acquittal of Mohd. Kassim bin Yatim at the close of the prosecution case in respect of three charges under section 12(1)(d) of the Passports Act, 1966. That section provides that if any person with intent to obtain for himself or any other person a passport or other travel document knowingly makes any false statement which to his knowledge is false in any material particular commits an offence punishable under that section. The charges are that the accused knowingly made false statements separately on three application forms for passports of Wong Har, Liew Sew Wah and Mok Kok Khung on July 29, 1969, on August 2, 1969, and on August 5, 1969, respectively to the effect that he had known these applicants for certain number of years and signed against those statements with the name "Mohd. Kassim bin Yatim, PJK." It was in evidence that the accused was awarded a P.J.K. in 1959 which award was published in the *Gazette* No. 39/59. It was also in evidence that it had been the practice for the immigration officers to accept recommenders for applications for passports from amongst persons who are holders of P.J.Ks., along with Members of Parliament, bank officials, medical practitioners and others of similar standing.

The three applicants for the passports referred to above gave evidence (PW6, PW7 and PW9) and all testified that their application forms were filled up by a certain Chinese petition writer who typed out the particulars in the forms and who also told them he could find a suitable recommender for them. In each case the forms were handed back to the applicants the following day and the recommendation already made and appeared to have been signed by a person named "Mohd. Kassim bin Yatim, PJK." In each case also a sum of money was paid to the petition writer as consideration for the recommendation. But in each case the applicants (PW6, PW7 and PW9) testified that they never saw much less knew who the said "Mohd. Kassim bin Yatim" was and therefore to that extent the statements in the application forms were false. Subsequently all the applicants submitted their applications to the Immigration Department and later obtained their passports.

One special difficulty encountered by the prosecution in this case was the absence of the Chinese petition writer referred to by all the applicants who was said to have filled the forms for them and who obtained the signatures purported to be those of the accused. There was therefore an absence of a direct link between those signatures and the accused. The investigating officer in the case (PW2) explained the absence of this very vital witness as follows: —

> "I then went with him (P.W.9) to the place where the petition writers at Douglas Road sit so as to try to find the person who filled the application for him. We were looking for a Chinese petition writer. After that both of us went to the Immigration Department to try to identify a certain Indian gentleman. We could not trace any of the 2 persons. In the earlier two cases (referring to P.W.6 and P.W.7) I did not make any attempts to trace the petition writer as our investigations revealed that they could not be traced."

Later in his evidence PW2 did however testify to the effect that he interviewed several more petition writers in the same area but could not trace the "authors of the applications." Obviously the phantom writer had disappeared and with him the only direct evidence which might connect the accused to the statements and the signatures in the applications forms P3, P4 and P5. I do not think however that any blame can be attached to the prosecution for the non-production of this very material witness and that an adverse inference should be drawn against the prosecution as there was in my view sufficient proof of attempts to trace him but which were unsuccessful.

As a result of this disadvantage the prosecution had to endeavour to show by indirect evidence that it was the accused who made the statements in the application forms and signed the statements under his name. This they attempted by obtaining the specimen signatures of the accused on separate pieces of paper (P6A-C) and adducing evidence of the handwriting expert (PW8) and the Assistant Passport Officer (PW10) who was familiar with the signature

of the accused. To supplement this the prosecution also brought the Assistant Information Officer (PW4), and the chief clerk in the Immigration Office (PW11) to testify on the signature of the accused.

Let us then look at the evidence of these witnesses, PW8 testified that the handwriting on those forms P3, P4 and P5 was "similar" to that appearing in the slips of paper P6A-C signed by the accused. But he said he was not certain although he was of the opinion that the "evidence is consistent with the signatures of paragraph 8 in exhibits P3, P4 and P5" being signed by the writer of the signatures of the application in P9 (form for leave signed by the accused). These application forms for leave by the accused (P9) were obtained from the department by PW2 in the course of his investigation.

PW4 who was the immediate superior to the accused in the department said that he was familiar with the signature of the accused. He had known the accused for twenty years and in the course of his work had seen the writing and signatures of the accused and was familiar with them. This witness testified that the signature on P3 looked like the signature of the accused and very similar to it although he would not say for certain it was the accused's signature. He gave similar evidence in regard to P4 and P5. At the end of his examination-in-chief he said "In the normal course of business I would accept this handwriting as his." But he quickly added "It may be a forgery and it was a very good forgery."

PW10 also testified that he was familiar with the signature of the accused although he professed he did not know him. There is little value to be attached to the evidence of this witness for the purpose of proving that the signatures in the application forms were that of the accused. His evidence did not go beyond an attempt to show that there had been previous applications bearing the same signature but such evidence would in my view be prejudicial and should be ignored. But the evidence of PW11, the chief clerk of the department of the accused, would be relevant to show that the signatures on the application forms for leave (P6) were that of the accused which PW8, the handwriting expert, said were similar to the signature on the application forms for the passports, P3, P4 and P5. When P3, P4 and P5 were shown to PW11 he further testified that if these signatures appeared on application forms for leave he would take it to be from the accused and would approve the application.

Those were the evidence on the handwriting of the accused. PW8 undoubtedly was an expert in his own field. PW11 was a person familiar with the handwriting and signatures of the accused as they worked in the same office. PW4 was also a person who had known the accused for twenty years and had been familiar with his handwriting and signature. I have no doubt that all these witnesses gave their honest opinion. It is left to the court to assess their evidence properly in the light of other evidence if any.

It is settled law that evidence by a handwriting expert can never be conclusive because it is only opinion evidence — see *Ishwari Prasad* v. *Mohd. Isa.*[1] The assessment of evidence of handwriting experts was also dealt with in *Indar Datt* v. *Emperor.*[2] In that case *In re B. Venkata Row*[3] was cited and also a quotation from *Dr. Lawson's* work on the Law of Expert and Opinion Evidence, which runs as follows:

> "The evidence of the genuineness of the signature based upon the comparison of handwriting and of the opinion of experts is entitled to proper consideration and weight. It must be confessed however that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that in this opinion experienced laymen unite with the members of the legal profession. Of all kinds of evidence admitted in a court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence."

In *Srikant* v. *King Emperor,*[4] two learned judges of the Allahabad High Court observed that:

> "To base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe."

and this observation was approved of by a bench of two other learned judges of the same court in *Kali Charan Mukerji* v. *Emperor.*[5]

Another difficulty encountered by the prosecution in this case was the weight that the court should put on the evidence of the applicants for the passports, PW6, PW7 and PW9. There is no mention by the learned President in her grounds of judgment as to her own assessment of this evidence. But the prosecution had brought the three applicants primarily to show that the accused had knowingly made false statements in the application forms and that the knowledge that the statement was false could be highly material in the proving of the offence charged. But a basic question here is whether these three witnesses are not accomplices and their evidence to be judged as such and that the court must be cautious in accepting such evidence without some independent corroboration. In my view they are clearly accomplices. In *Abdul Rahman* v. *Public Prosecutor*[6] it was held that the term —"accomplice" includes all persons who have been concerned in the commission of an offence, whether they are concerned as principals or merely as accessories. In that judgment of Murray Aynsley J., the following appears: —

> "... The circumstances are such that I think these persons must have known very well that they were engaged in a dishonest transaction; it does not show that they were thieves equally with the accused, who was charged with the theft of this iron piping.
>
> Certain Indian cases appear to narrow the meaning of the term "accomplice" to a person who is guilty of the same offence as the accused.
>
> I think that this is wrong; I think that the principle on which the rule relating to accomplice is based would make the evidence of an accessory as much subject to suspicion as that of a principal. I think therefore that these persons should have been treated as accomplices. That being so, what is the position of their evidence according to the law in force in the F.M.S."

In *Goh Khiok Phiong* v. *Regina*[7] it was held that in deciding whether a witness should be treated as an accomplice the trial judge should ask himself this question: "Is there any evidence upon which I can properly rule that the witness was a participant in the offence?" At page 225 of the judgment Smith J. said: —

> "The question which should have been put by the learned judge may be expressed thus: "Is there any evidence upon

which the trial judge could properly rule that Dol was a participant in the offence?' That is the all-important question as appears from the judgment of Simonds L.C. in *Davies* v. *Director of Public Prosecutions*.[8]"

After the prosecution closed their case on November 10, 1972, the learned President having found that the prosecution had failed to prove that the signatures on P9 was that of the accused and that the handwriting expert (PW8) did not give his opinion with certainty she acquitted the accused without calling for the defence. When the appeal by the Public Prosecutor was heard in the High Court in March 1975, the High Court ordered that certain exhibits which were wrongly rejected by the learned President should be readmitted and reconsidered in the light of the other evidence. On August 1, 1975, hearing was resumed before the learned President and the handwriting expert (PW8) was again recalled and was asked to give his opinion on the signature of the accused on exhibits P6A-C (which were rejected earlier by the President.) The learned President after hearing the evidence came to the same conclusion as previously that the handwriting expert was not absolutely certain that the signatures on exhibits P3, P4 and P5 and the signatures on P6A-C were made by one and the same person and on that ground alone acquitted and discharged the accused.

Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainty. It has always been accepted that expert evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

On this basis let us recapitulate the evidence adduced by the prosecution. In all the prosecution called eleven witnesses to give evidence. PW1 was an officer of the Anti-Corruption Agency who lodged a report but the report was not admitted. PW2, another officer of the Anti-Corruption Agency, was the investigating officers. PW3, Director of Information, Perak, testified only in respect of the fact that the accused obtained the award of P.J.K. in 1959. PW4, PW8, PW10 and PW11 were the witnesses on the handwriting and signatures of the accused which had been dealt with already. Finally, PW6, PW7 and PW9, the applicants for the passports whose evidence had also been dealt with earlier. It can be seen therefore that of the four categories of witnesses only the last two would appear to be the witnesses whose evidence the prosecution relied on for the purpose of establishing a *prima facie* case against the accused in respect of the offence charged. Of the two categories obviously the prosecution relied heavily on the evidence of those witnesses who testified on the handwriting and signatures of the accused. Even if the learned President did not regard PW6, PW7 and PW9 as accomplices or that she believed them although no indication was made in her grounds of judgment the fact still remains that there must be some evidence to link the accused with the handwriting on the application forms P3, P4 and P5. PW8 was the handwriting expert. The other two witnesses were familiar with the handwriting of the accused. The cumulative effect of all their combined evidence cannot however be stronger than ordinary opinion evidence. Sarkar says it is certain that all such proof is even in its best form "precarious and often extremely dangerous." It has been well remarked that many persons write alike. In my view evidence of handwriting expert or experts by itself without any other corroborative evidence is not normally sufficient for the purpose of recording a definite finding. In this case there is of course a very strong suspicion but suspicion however strong can never substitute for *prima facie* case. Conclusions based on mere comparison of handwriting must at best be indecisive and yield to positive evidence — see *Guntaka* v. *Busetti*.[9] It has been said that the art of forming opinion by comparison of handwriting is essentially empirical in character and "error is seldom inseparable from such opinions" — see Sarkar on Evidence, 12th Edition, page 513. According to Glanville Williams it is a "fertile source of error" because the comparison of handwriting is a matter of opinion. Glanville Williams also correctly said in his book 'The Proof of Guilt' that the general practice which is extremely objectionable is to give the expert only two specimens of handwriting to pronounce upon — one the admitted handwriting of the accused and the other the disputed one. The expert if asked to find similarities will invariably find some similarities.

In this case in the final analysis the court would have to ask itself the question whether at the close of the prosecution evidence it could say certainly that the prosecution had established a *prima facie* case, which if unrebutted, would have warranted a conviction. I do not think one could honestly answer that question in the affirmative in this case.

For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong.*

N.T.S. ARUMUGAM PILLAI v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Chang Min Tat J.) September 13, 1976]
[Penang — Originating Motion No. 1 of 1976]

Revenue Law — Income Tax — Back duty investigation — Additional assessments — Some additional assessments statute-barred unless there was fraud or wilful default — Onus of proof — Whether rules of natural justice complied with — Income Tax Ordinance, 1947, ss. 69(1) & 76(3) — Income Tax Act, 1967, ss. 3, 91(3).

The appellant after a back-duty investigation was assessed to tax in the sum of $8,145,841.50. This included additional assessments for the years 1953, 1957 to 1959 inclusive which would be statute barred unless there was fraud or wilful default on the part of the taxpayer. Additional assessments were also raised for the year 1971 and assessments for the years 1962, 1966-1972. On appeal to the Special Commissioners it was ruled that the onus of proving fraud or wilful default for the statute-barred period was on the Revenue while the onus of proving that the tax assessed was excessive and erroneous was on the appellant. The Special Commis-